Short v. *Coffin* (5 Burrow. p. 2730), and *Ward* v. *Thomas* (1 Crompton & Meeson p. 532), (referred to in *Hancocke* v. *Prowd*, 85 English Reports at p. 482, note (10)).

In *Green* v. *Rennet* (1 T. R. p. 782=99 E. R. p. 1376) Buller, J. speaks of such amendment as being a common proceeding.

In *Gorton* v. *Gregory*, a judgment *de bonis propriis* was amended by the Exchequer Chamber, i.e. as it were, on appeal.

But the Court has a discretion whether to amend or not (*Burroughs* v. *Stevens*, 5 Taunton p. 554).

Order amending judgment.

Solicitors for the Plaintiff—*Donaldson & Burkinshaw.*

[ORIGINAL CIVIL JURISDICTION]

MILLS, J.

October 14, 1933.

S. V. S. MUTHURAMAN CHETTIAR AND ANOTHER

vs.

1. EE KONG GUAN
2. C. KASIVISVANATHAN CHETTIAR

[MALACCA CIVIL SUIT No. 36 of 1925]

Fraudulent breach of trust—nature and measure of relief given to cestui que trust against trustee.

Where a person in a fiduciary capacity had committed a fraudulent breach of trust of shares in a limited liability company.

Held, that the *cestui que trust* was entitled to elect whether he would take the shares themselves plus all dividends received and interest thereon with annual rests or the highest possible price which the shares ever attained while in the hands of the wrong-doer plus dividends up to that point and simple interest upon such price from that point.

Further consideration of action.

The plaintiff as representative of one S. V. S. Supramanian Chettiar deceased brought this action for a declaration that the deceased was a sub-partner with the 1st Defendant's share in a partnership known as the Leong Watt Hin Estate. This partnership was formed for the purpose of opening up and working a rubber estate in Malacca. After this partnership had been in existence for some 5 or 6 years the business was turned into a limited company and the partners in the partnership were allotted shares in the limited company in proportions corresponding to their shares in the capital of the partnership. There were no other shareholders for the first few years of the Company's existence. The Plaintiff claimed that the 2nd Defendant had been guilty of fraudulent breach of trust in respect of the sub-share belonging to the deceased and of the shares in the limited company. The action came on for trial before Mills, J. and he found in favour of the Defendants on a plea of limitation. He found that the claims were based on breach of trust but held that the case did not fall within a "trust for a specific purpose" within the meaning of Section 9 of the Limitation Ordinance. From this decision the Plaintiff appealed to the Court of Appeal (Sproule, J., Thorne, J. and Terrell, J.) which unanimously allowed the appeal.

In paragraph 5 of the Judgment of the Court of Appeal it was declared that the 2nd Defendant received as Trustee for the said S. V. S. Supramanian Chettiar deceased 1,250 shares in the Leong Watt Hin Estate Limited and that the 2nd Defendant must account to the Plaintiff for all monies received by him or his agent in respect thereof either by way of dividend or otherwise. The Court of Appeal also ordered inter alia that accounts from November 20, 1917 of all monies received or which ought to have been received by the 2nd Defendant or his agent in respect of the said 1,250 shares in the Leong Whatt Hin Estate Ltd., be rendered and the Court of Appeal also directed an enquiry as to ascertain what was the highest value which the shares in the Leong Whatt Hin Estate Ltd., reached prior to the date of the Judgment of the Court of Appeal.

In making this order the Court did not finally decide that the Plaintiff was entitled to the highest value of such shares as set out above. The decision on this matter was left over pending further argument on further consideration consequent on the result of the enquiry ordered. The enquiries and accounts were duly made and taken. Thereupon the action came on for hearing on further consideration. Each side had applied by summons to vary the Registrar's Certificate but both these applications were dismissed by consent. The substantive question for decision on the further consideration was whether or not the Plaintiff was entitled to the highest value which the said shares had reached during the period between the issue of such shares to the 2nd Defendant and the Judgment of the Court of Appeal.

The text of the Judgment of the Court of Appeal appears in a note appended to this report.

Roland Braddell (*Briggs* with him) for the Plaintiff.

E. A. Stevens (*Goho* with him) for the 2nd Defendant.

The facts and arguments sufficiently appear from the judgment.

Cur. Ad. Vult.

MILLS, J.—By an Order of the Court of Appeal dated 14th September, 1931, the further consideration of this action was adjourned, and, the Registrar's enquiries directed by that order having been completed, the action now comes on for further consideration.

Applications to vary the Registrar's certificate have been withdrawn. By consent, I

confirm the Registrar's certificate dated the 28th August, 1933.

On the further consideration, the only matters to be considered are the rights and liabilities of the plaintiff and the second defendant in regard to

(1) shares in the Leong Watt Hin Partnership,

(2) shares in the Leong Watt Hin Estate Limited.

The Court of Appeal has ordered that the second defendant must account to the plaintiff in respect of both classes of shares.

As to the shares in the partnership; the Registrar has found that the total sum of $46,071.42 was received by the second defendant or his agents in respect of these shares; but the Registrar has not found the dates on which payment was made of the various sums comprised in this total and a finding on this point is necessary for the calculation of interest (at 6% interest from the date of each receipt with annual rests) up to the date of the present judgment.

The Registrar must make a further enquiry and calculate the whole amount now due by the second defendant to the plaintiff, unless within two weeks or such longer period as may be allowed by the Registrar, the parties themselves agree to the correct figure.

As to the shares in the Limited Company; the Court of Appeal has held that the plaintiff is entitled to recover 1,250 shares or their value, in addition to all bonus and dividends, the question whether the plaintiff is entitled to elect at what period the value of the shares is to be taken, was reserved for decision on the further consideration of the suit; and I now proceed to determine that question.

The objection was raised on behalf of the second defendant that the plaintiff cannot now be heard to claim the value of the shares since in his pleadings he claimed only the recovery of the shares and not their value: as, however, the Court of Appeal has decided that the plaintiff is entitled to the value of the shares, I am debarred from considering the objection.

Counsel for the plaintiff contends that, as the second defendant has committed a fraudulent breach of trust, the plaintiff has the option of taking a sum of money representing the value of the shares at any date which the Plaintiff chooses to specify, and that he may choose to specify the year 1925 when the value of each share was, as found by the Registrar, $163.70 Councel quotes the case of *Eden* v. *Ridsdales Railway Lamp and Lighting Company Limited* (23 Q.B.D. p. 368) and other cases which he says illustrate the principle for which he contends.

Counsel for the second defendant, on the other hand, maintains that he will be satisfying the order of the Court of Appeal if he

(a) tenders the original 1,250 shares together with other shares which he has obtained by holding the original shares, and

(b) pays to the plaintiff a sum of money equivalent to the sums which he has received by way of bonus and dividends, together with interest on such receipts.

He further maintains that the cases quoted on behalf of the plaintiff refer only to misfeasances committed by directors of companies, that there is no instance of an administrator being ordered to pay according to the highest value attained by investments, and that, as he did not in fact sell the shares, justice requires that he should not be required to pay over a sum of money which he has not received.

In my opinion the correct position is as follows,

(1) the Court of Appeal has held that the plaintiff is entitled to take the value of the shares,

(2) the Court of Appeal has left it to this Court to decide whether the plaintiff is entitled to fix the date at which the shares should be valued,

(3) the relief which ought to be granted to the plaintiff is a matter which lies within the Court's discretion to be exercised judicially according to principle.

I need not refer further to (1) and (2): they are statements of fact: (3) contains a proposition of law derived from decided cases; I refer to *Carling's* case (1) Ch.D. p. 115, at p. 123:—"But then the question arises, what is the mode in which relief is to be given in respect of such breach of trust? Of course we are not capriciously to punish the persons who have committed it. We have to see that, if they are punished, they are punished in due course of law"; and again at p. 124, James L.J. says "That leaves the appellants liable to be called upon . . . to make such compensation as the Court shall think ought to be made under the circumstances with respect to the misfeasance"; I also refer to those parts of the judgments in which the *quantum* is considered, in the cases of

Shaw v. *Holland* (1900 2 Ch. p. 305 at pp. 309—313), and *Jubilee Cotton Mills, Ltd.* (1923. 1 Ch. p. 1 at p. 17 and 1924 A.C. p. 958 at pp. 967 and 971).

In the exercise of their discretion the Courts have made at least three different kinds of orders against persons who wrongfully obtained shares,

(a) as in *Eden's* Case, they ordered repayment at the highest value attained by the shares while held by a director,

(b) as in the *Jubilee Cotton Mills* Case, they ordered repayment at the real, not at the nominal value, of shares (1924 A.C. p. 958, at p. 979),

(c) as in the case of *Shaw* v. *Holland*, they ordered repayment, not at the highest value, but at the value as at the time of allotment.

Counsel for the plaintiff is right, in my opinion, when he contends that the cases in which company directors or promoters are involved, merely illustrate the general principle; the cases contain many expressions showing that they proceed on the fiduciary relation between the parties, for instance

(a) in *Carling's* Case (1 Ch. D. p. 115 at p. 123), James L.J. speaks of the directors as "trustees for the company" and enquiries what relief should be given in respect of the "breach of trust";

(b) in *Pearson's* Case (5 Ch. D. p. 336 at p. 342) it is stated that the director was a trustee;

(c) in *Hay's* Case (10 Ch. App. p. 593 at p. 605) the director is stated to be a trustee, an agent;

(d) in *Eden's* Case, the director's liability is founded on agency: Lord Esher, M.R. (at p. 371) states "If that which the agent has received is money he must hand it over to his principal, if it is not money, but something else, the principal may insist on having it, or, if he chooses, the value of it. An agent who has so failed in his duty ought to have at once informed his principal of the breach of duty. In such a case the principal would claim that which the agent has received, and would thus have an opportunity of selling at the highest value reached."

(e) in the *Jubilee Cotton Mills* Case, the promoter is stated to stand in a fiduciary position towards the company, and to be a trustee (1924 A.C. p. 958 at pp. 964—5, and at p. 970).

It may be true, as Counsel for the second defendant points out, that in no reported case has an administrator been ordered to make restitution based on the highest value attained by shares under his control, but that he is under a liability to do so when the justice of the case requires it, is, in my opinion, necessarily to be inferred from the judgment of Bacon, V.C. in the case of *Nanty-Glo and Blaina Iron Works Company* v. *Grave* (12 Ch. D. p. 738 at p. 748), when the Vice-Chancellor indicates his view that when a clear breach of trust has been committed, the defaulting trustee cannot always acquit himself of all obligation by giving back the thing which he has received, and in referring to the case of *Lyon* v. *Home* (6 Eq. p. 655) the Vice-Chancellor expresses the opinion that a person who has wrongfully possessed himself of stock by undue influence might, if justice so required it, be ordered to repay a sum equivalent to the value of the stock before its depreciation.

On a consideration of the cases, then, it appears that liability was based

(a) in this case of a director of a company, on the fact that he was an agent of the company,

(b) in the case of a promoter of a company, on the fact that he was a trustee for the company,

(c) in the case of a person who wrongfully obtained possession of property by undue influence, on the fact that a fiduciary relation existed between him and the person from whom he obtained the property.

The common ground, and the only common ground, on which liability is based, is the existence of a fiduciary relation.

The question arises for determination, then, what is the mode in which relief is to be given in respect of the present breach of trust.

All the circumstances of the case must be considered.

Reading the judgments of the Judges of the Court of Appeal, I conclude that they took a most serious view of the second defendant's delinquencies; and this Court is bound by their opinion.

Moreover, the general rule is that a wrongdoer ought to be fixed with the highest possible price which the shares ever attained while in his hands (*Shaw* v. *Holland*, 1900 2 Q.B.D. p. 305 at p. 311).

Under the circumstances, it seems to me just that the second defendant should be ordered to pay the largest possible amount of damages: that amount will be the sum which these 1250 shares would have realised if they had been sold in 1925 when the value of each share was $163.70; he should also be ordered to repay the amounts received as bonus or dividends from the Company; he should also be ordered to pay interest at 6% with annual rests on each sum received as bonus or dividend, as from the date of each receipt to the date of this judgment; he should also be ordered to pay interest at 6% on the sum of $204,625 as from the date when the last bonus or dividend was received by him in the year 1925 to the date of this judgment.

The plaintiff has the option of electing whether he will take the shares or a sum of money representing the value of the shares together with bonus and dividends, and interest as above set out.

The plaintiff must within 2 weeks make an oral declaration before this Court, or file a written declaration stating which of these two kinds of relief he elects to take.

If the plaintiff elects to take a sum of money representing the value of the shares with bonus, dividends and interest, the Registrar must make

a further enquiry and calculate the total amount due to the plaintiff, unless within two weeks from the date of such declaration, the parties themselves agree to the correct figure.

The further consideration of this action is adjourned.

The parties have liberty to apply.

Solicitors for the Plaintiff: *Braddell Brothers.*

Solicitor for the 2nd Defendant: *S. C. Goho.*

THIS COURT DOTH DECLARE

(1) That the shares specified in paragraph 2 of the Statement of Claim herein and hereinafter called the said miscellaneous shares *viz.*—1000 Ayer Panas shares, 500 Ayer Molek shares, 200 Bukit Kajang shares, 100 Tebong shares, 145 Punggor shares were the private property of S. V. S. Supramanian Chetty deceased at the time of his death;

(2) That the 5 shares out of the 1st defendant's 13 shares in the Chop Leong Watt Hin rubber estate, mentioned in paragraph 3 of the Statement of Claim herein and hereinafter called the said Leong Watt Hin shares were the private property of the said S. V. S. Supramanian Chetty deceased at the time of his death;

(3) That the 1st Defendant was at the date of the death of the said S. V. S. Supramanian Chetty deceased trustee of the said miscellaneous shares and subject to what is directed further herein below must account to the plaintiff for the said shares and all moneys received or which he ought to have received in respect thereof either by way of sale or dividend;

(4) That the 2nd defendant was trustee for the estate of the said S. V. S. Supramanian Chetty deceased of all moneys paid to him or his agents in respect of the said Leong Watt Hin shares and must account to the Plaintiff for all such moneys;

(5) That the 2nd defendant received as trustee for the estate of the said S. V. S. Supramanian Chetty deceased the 1,250 shares in the Leong Watt Hin Estate Ltd. mentioned in paragraph 13 of the Statement of Claim herein and must account to the Plaintiff for the said shares and for all moneys received or which ought to have been received by him or his agents in respect thereof either by way of dividend or otherwise;

AND THIS COURT DOTH DIRECT AND ORDER that the following accounts be taken and enquiry held, that is to say:—

(*a*) an account of all moneys received by the 1st Defendant in respect of the said miscellaneous shares, the 1st Defendant being entitled on the taking of such account to credit himself with the unsold 1,000 Ayer Panas, 100 Tebong and 145 Punggor shares which he handed over to the 3rd party S. V. S. Sanmugam Chetty on the 22nd July, 1915;

(*b*) an account of all moneys received by the 2nd defendant or his agents in respect of the said Leong Watt Hin shares;

(*c*) an account from November 20th 1917, of all moneys received or which ought to have been received by the 2nd Defendant or his agents in respect of the said 1,250 shares in the Leong Watt Hin Estate Ltd.

(*d*) an enquiry to ascertain what has been the highest value which a share in the Leong Watt Hin Estate Ltd. has reached prior to the date of this judgment;

AND THIS COURT DOTH DECLARE that upon the taking of the said account (*a*) above directed the 1st Defendant is estopped from crediting himself with any moneys alleged by him to have been paid out of any dividends received by him upon the said miscellaneous shares;

AND THIS COURT DOTH DIRECT that upon the taking of the said account (*a*) above directed the 1st defendant shall be debited with simple interest at the rate of 5 per centum per annum upon all sums received by the 1st Defendant from the date of their receipt and that upon the taking of the Accounts (*b*) and (*c*) above directed the 2nd Defendant shall be debited with punitive interest at the rate of 6 per centum with yearly rests upon all sums received or which ought to have been received, as the case may be, by him or his agents from the date when such sums were or ought to have been so received;

THE END OF THE STRAITS SETTLEMENTS OFFICIAL REPORTS.

[ORIGINAL CIVIL JURISDICTION]
HUGGARD, C.J.
September 22, 1933.
[APPELLATE JURISDICTION]
THOMAS, C.J. (F.M.S.), GERAHTY and MILLS, JJ.
December 1, 1933.

RE CHOP KWONG FOOK SENG & CHAN CHAN PHANG *ALIAS* CHAN YING CHEONG a partner thereof, *EXPARTE* THE NATIONAL, COMMERCIAL & SAVINGS BANK (S'PORE), LTD. (In Voluntary Liquidation).

[SINGAPORE BANKRUPTCY No. 378 of 1933]
[SINGAPORE CIVIL APPEAL No. 24 of 1933]

Bankruptcy—Judgment entered against firm—Bankruptcy Notice addressed to firm and a partner thereof—whether form of notice misleading—proof of residence of debtor—illegal partnership—Receiving Order against partner—Ordinance No. 44 (Bankruptcy) Ss. 3 (1) (i), 86, 91(5), Bankruptcy Rule 13, Civil Procedure Code, s. 780.

A Receiving Order was made against a partner of a firm against whom the petitioning creditors had recovered judgment in the firm name. The Petition was founded upon an act of bankruptcy consisting of failure to comply with a Bankruptcy Notice issued to the firm and to the partner. In the petition it was alleged that the debtor (that is, the partner) "had for the greater part of six months next preceding the presentation of the petition resided or carried on business at No. 45, Hongkong Street and/or 43, Upper Hokien Street, Singapore, within the District of the Court." The petition was supported by the usual affidavit verifying the statements therein. In fact the petitioner had no personal knowledge of the place of residence or of business of the debtor. Upon the hearing of the petition it was contended on behalf of the debtor that (1) the residence of the debtor had not been proved (2) the Bankruptcy Notice did not follow the judgment and (3) the judgment was invalid by reason of its having been entered against an illegal association.

Held, (by Huggard, C.J. and confirmed on appeal) that failure to furnish strict proof as to the carrying on of business or residence of a debtor is no ground for rejecting the petition.

Held further, that the debtor could not have been misled or perplexed by the form in which the Bankruptcy Notice was addressed.

In re Wenham, (1900) 2 Q.B. 698, applied.

Held also, that the illegality of the partnership affords no reason for refusing to make a Receiving Order against a partner therein.